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PATRICK WOOD, III, and UWE-ERNST BUFE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE SUNPOWER SECURITIES
LITIGATION

Case No. CV 09-5473-RS
(Consolidated)

CLASS ACTION

**REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF SUNPOWER
DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED CONSOLIDATED
COMPLAINT**

Judge: Hon. Richard Seeborg
Courtroom: 3
Hearing Date: August 11, 2011
Hearing Time: 1:30 p.m.

REQUEST FOR JUDICIAL NOTICE

Defendants SunPower Corporation, Thomas H. Werner, Dennis V. Arriola, Emmanuel T. Hernandez, John B. Rodman, T.J. Rodgers, W. Steve Albrecht, Betsy S. Atkins, Patrick Wood, III, and Uwe-Ernst Bufe (collectively, the “SunPower Defendants”) have moved to dismiss Plaintiffs’ First Amended Consolidated Complaint (the “FAC”). In support of their Motion, the SunPower Defendants request that this Court take judicial notice, under Federal Rule of Evidence 201, of the documents attached as exhibits to the Declaration of Angela E. Kleine in Support of SunPower Defendants’ Motion to Dismiss Plaintiffs’ First Amended Consolidated Complaint (“Kleine Declaration”).

Federal Rule of Evidence 201 authorizes a court to take judicial notice of facts that are “not subject to reasonable dispute” and “either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Judicial notice is “mandatory” if it is “requested by a party and [the Court is] supplied with the necessary information.” Fed. R. Evid. 201(d).

The contents of **Exhibits 1** through **31** attached to the Kleine Declaration meet these standards.¹

Exhibits 1 through **19** are documents that the SunPower Defendants filed with the SEC.² **Exhibit 20** is a document that Digimarc Corporation filed with the SEC. Documents filed with

¹ The Court may consider **Exhibits 2** through **10**, **12** through **19**, and **21** through **28**, regardless of whether it takes judicial notice of the contents of those documents, because they are incorporated by reference into the FAC, or the FAC necessarily relies upon them. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998); *In re Versant Object Tech. Corp. Sec. Litig.*, No. C-98-00299-CW, 2000 U.S. Dist. LEXIS 22333, at *8-9 (N.D. Cal. May 18, 2000). Individual paragraphs of the Kleine Declaration indicate which FAC paragraphs rely on each exhibit.

² The Court should also consider **Exhibits 2, 4, 6, 8, 10**, and **14** because those documents contain cautionary language accompanying forward-looking statements. 15 U.S.C. § 78u-5(e) (“the court shall consider any statement cited in the complaint and any cautionary statement accompanying . . . forward-looking statement[s], which are not subject to material dispute, cited by the defendant.”); *Emp’rs Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1133 (9th Cir. 2004).

the SEC are matters of public record and their contents may be judicially noticed. *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006); *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 758 (N.D. Cal. 1997) (courts may “take judicial notice of the contents of relevant public disclosure documents required to be filed with the SEC as facts capable of accurate and ready determination”); *In re CNET Networks, Inc. S’holder Derivative Litig.*, 483 F. Supp. 2d 947, 953-54 (N.D. Cal. 2007) (taking judicial notice of contents of public filings, including proxy statements); *Copperstone v. TCSI Corp.*, No. C-97-3495-SBA, 1999 U.S. Dist. LEXIS 20978, at *49 n.15 (N.D. Cal. Jan. 19, 1999) (same).

The Court should also take judicial notice of the contents of the documents attached as **Exhibits 21** through **28** to the Kleine Declaration. **Exhibits 21** through **28** are transcripts of SunPower Corporation recorded conference calls with investors. The contents of the investor conference calls are “not subject to reasonable dispute” and are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”³ Fed. R. Evid. 201(b); *see Brodsky v. Yahoo! Inc.*, 630 F. Supp. 2d 1104, 1111 (N.D. Cal. 2009) (taking judicial notice of the contents of conference calls with investors).

The court should take judicial notice of the membership and responsibilities of the Audit Committee of SunPower’s Board of Directors. The information is disclosed in **Exhibits 1** and **11**, which are SunPower Corporation’s annual proxy statements on Schedule 14A filed with the SEC. These documents are “not subject to reasonable dispute,” and are “capable of determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b); *In re Computer Scis. Corp. Derivative Litig.*, 244 F.R.D. 580, 587 n.8 (C.D. Cal. 2007) (taking judicial notice of board and committee memberships disclosed in proxy statements).

The court should also take judicial notice of the facts that Mr. Albrecht was a trustee of the foundation that oversees the Financial Accounting Standards Board and the Governmental

³ **Exhibits 21** through **28** are cited in the FAC and the Court may consider them regardless of whether it takes judicial notice of their contents. *See supra* note 1; *see also Tellabs*, 551 U.S. at 322. **Exhibits 21** through **23** and **25** through **27** should also be considered by the Court because they contain cautionary language accompanying forward-looking statements. *See supra* note 2; *see also* 15 U.S.C. § 78u-5(e); *Clorox*, 353 F.3d at 1133.

Accounting Standards Board, and the former president of the American Accounting Association and the Association of Certified Fraud Examiners. Mr. Albrecht's positions in those organizations are described in documents filed with the SEC (**Exhibits 1, 11**), the Financial Accounting Foundation's annual report (**Exhibit 31**), the American Accounting Association's bylaws (**Exhibit 29**), and the Association of Certified Fraud Examiners' mission statement (**Exhibit 30**). These are public materials "not subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1084 n.2 (C.D. Cal. 2001) (taking judicial notice of company's website description of itself); *Alvara v. Aurora Loan Servs., Inc.*, No. C-09-1512-SC, 2009 U.S. Dist. LEXIS 50365, at *3 n.3 (N.D. Cal. June 16, 2009) (taking judicial notice of information on the Federal National Mortgage Association website because the "information contained therein is neither disputed nor reasonably questioned").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court take judicial notice of the contents of the documents attached as **Exhibits 1** through **31** to the Kleine Declaration.

Dated: May 23, 2011

JORDAN ETH
JUDSON E. LOBDELL
ANGELA E. KLEINE
MORRISON & FOERSTER LLP

By: /s/ Judson E. Lobdell
Judson E. Lobdell

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BETSY S. ATKINS, PATRICK WOOD, III,
and UWE-ERNST BUFE

ECF CERTIFICATION

I, Angela E. Kleine, am the ECF User whose identification and password are being used to file this Request for Judicial Notice in Support of Sunpower Defendants' Motion to Dismiss Plaintiffs' First Amended Consolidated Complaint. In compliance with General Order 45 X.B., I hereby attest that Judson E. Lobdell has concurred in this filing.

Dated: May 23, 2011

By: /s/ Angela E. Kleine
Angela E. Kleine